No. 17-1077

In The Supreme Court of the United States

FRANCIS V. LORENZO,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* SECURITIES LAW PROFESSORS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are law professors who teach and write about the federal securities laws.[1] They have an interest in the appropriate development and content of the laws governing liability for securities fraud in enforcement actions by the SEC and private civil actions for damages.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for a party wrote this brief in whole or in part, and no one other than *amici curiae* or their counsel contributed money to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a) of the Rules of this Court, the parties have consented to the filing of this brief.

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The views of the amici curiae expressed here do not necessarily reflect the views of the institutions with which they are or have been affiliated. The names of institutions are included for identification only.

SUMMARY OF ARGUMENT

The court below was mistaken in holding that the limitations in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), on primary liability for a misstatement do not apply to all parts of Section 17(a) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77q(a), and Rule 10b-5 under the Securities Exchange Act of 1934 (the "Exchange Act"), 17 CFR § 240.10b-5. The limitations on primary liability in both *Janus* and *Stoneridge Investment Partners, LLC v. Scientific-Atlanta*, Inc., 552 U.S. 148 (2008), apply to each subpart of those anti-fraud provisions and are essential to maintaining the dividing line established by Congress between primary liability and aiding and abetting under the federal securities laws.

Congress determined that an aider and abettor, that is, someone who did not engage in a primary violation, is a person who gives "substantial assistance" to a primary violation. If substantial assistance were enough for primary liability, as the

court below found, the distinction between a primary violation and aiding and abetting drawn by Congress in both the Securities Act and the Exchange Act would disappear. The difference between substantial assistance and conduct necessary to be a primary violator therefore is critical, yet the court below gave no consideration to the role of the "substantial assistance" language from the aiding and abetting statutes.

This Court's approaches in *Central Bank of Denver, NA v. First Interstate Bank of Denver, NA*, 511 U.S. 164 (1994), *Janus*, and *Stoneridge* also provide guidance on distinguishing between primary and aiding and abetting liability for securities fraud. Those decisions show that primary liability under Rule 10b-5 must be closely linked to a misstatement or misconduct that deceived a securities offeree, buyer, or seller. A primary violator is a person who has ultimate control and authority over that misconduct and who is separate and independent from other persons who may have participated in the fraud. The defendant in this case may well have given substantial assistance to the fraud committed by his superior, but he lacked the ultimate control and independence over the deception necessary to create primary fraud liability.

These principles apply to each subpart of Section 17(a) and Rule 10b-5. The language of Rule 10b-5 was derived nearly verbatim from Section 17(a). Some differences exist, but they do not affect the question in this case, which is the scope of primary liability under the two provisions. The identical language in the aiding and abetting statutes of the Securities Act and the Exchange Act supports the conclusion that the dividing line

between a primary violation of the anti-fraud provisions and aiding and abetting should be the same for both Section 17(a) and Rule 10b-5.

ARGUMENT

I. THE LINE BETWEEN PRIMARY LIABILITY AND AIDING AND ABETTING SHOULD BE THE SAME FOR ALL SUBPARTS OF RULE 10b-5 AND SECTION 17(a) AND SHOULD BE DERIVED FROM THE AIDING AND ABETTING STATUTES AND THIS COURT'S PRECEDENTS.

The question before the Court concerns the nature of the conduct sufficient for a primary violation of Section 17(a) of the Securities Act and Rule 10b-5 of the Exchange Act and the difference between primary liability and an aiding and abetting violation.[2] The question therefore is about the defendant's conduct, not the defendant's level of culpability.[3] The court below found that the *Janus* principles for determining primary liability for a

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[2] One of the amici curiae has written about several aspects of the issues now raised in this case. *See* Andrew N. Vollmer, *SEC Revanchism and the Expansion of Primary Liability Under Section 17(a) and Rule 10b-5*, 10 VA. L. & BUS. REV. 273 (2016).

[3] The rules on the level of a defendant's culpability or mental state are reasonably well settled. To be liable for a primary violation of Rule 10b-5 or Section 17(a)(1), a defendant must act with scienter. *See Aaron v. SEC*, 446 U.S. 680, 700 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). To be liable for a primary violation of Section 17(a)(2)–(3), a defendant must act negligently or worse. *See Aaron*, 446 U.S. at 695–97. To be liable for aiding and abetting, a defendant must act knowingly or recklessly. *See* 15 U.S.C. §§ 77o(b), 78t(e).

misstatement under Rule 10b-5(b) (one subpart of the Rule) did not apply to distinguish primary liability from aiding and abetting for other subparts of Rule 10b-5 or Section 17(a)(1). The court failed to identify alternative principles or ground its decision in the structure and context of the Securities Act and the Exchange Act.

After *Central Bank* and Congress's addition the following year of aiding and abetting authority for the SEC but not private plaintiffs in Section 20(e) of the Exchange Act,[4] the difference between primary liability and aiding and abetting for a Rule 10b-5 violation took on critical importance. A plaintiff in a private securities action under Rule 10b-5, including a class action, may assert a claim for a primary violation but may not sue a person for aiding and abetting.

Both the SEC and private plaintiffs have been dissatisfied with that development. Private plaintiffs were most affected, and they responded to *Central Bank* and Section 20(e) by seeking to expand the scope of primary liability under Rule 10b-5 to reach solvent and deep-pocket defendants. Private plaintiffs started to assert that third parties who did not issue a misstatement to investors had

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[4] Pub. L. No. 104-67, § 104, 109 Stat. 737, 757 (1995) (codified at 15 U.S.C. § 78t(e)). In 2010, Congress granted the SEC a claim for aiding and abetting a violation of the Securities Act, the Investment Company Act, and the Investment Advisers Act. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 929M(a), 929N, 124 Stat. 1376, 1861, 1862 (2010) (adding Section 15(b) to the Securities Act, 15 U.S.C. § 77o(b), Section 48(b) to the Investment Company Act, 15 U.S.C. § 80a-47(b), and Section 209(f) to the Investment Advisers Act, 15 U.S.C. § 80b-9(f)).

nonetheless violated Rule 10b-5(a) and (c) by participating in a "scheme or artifice to defraud" and by engaging in a "course of business which operates . . . as a fraud or deceit" as a consequence of a business relationship with a primary violator that had issued a misstatement to investors. The SEC also broadened the concept of primary misconduct when asserting violations of Section 17(a) and Rule 10b-5, despite Congress's grant of authority to the Commission to sue aiders and abettors and assert other theories of secondary liability,[5] because the Commission prefers primary fraud charges.[6]

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[5] In addition to the general claim for aiding and abetting, the SEC may seek relief in an administrative proceeding against a person causing another person's violation. *See* Section 8A(a) of the Securities Act, 15 U.S.C. § 77h-1(a), and Section 21C(a) of the Exchange Act, 15 U.S.C. § 78u-3(a). The SEC may assert aiding and abetting and similar claims in an administrative proceeding to suspend or revoke the license of a regulated or associated person. *See, e.g.*, 15 U.S.C. §§ 78o(b)(4)(E), (b)(6)(A). Both the SEC and private plaintiffs may assert claims for control person liability under Section 15(a) of the Securities Act and Section 20(a) of the Exchange Act.

[6] The SEC's charging decisions in *Lorenzo* and an earlier case cited frequently in the SEC's *Lorenzo* decision, *Flannery*, are evidence that the SEC favors primary fraud violations. The SEC charged Lorenzo and Flannery only with primary violations. *See In the Matter of Gregg C. Lorenzo, Francis V. Lorenzo, and Charles Vista*, Exchange Act Release No. 68943, 2013 WL 587864, at *12 (Feb. 15, 2013) (Order Instituting Proceedings Against Greg C. Lorenzo); *In the Matter of John. P. Flannery*, Exchange Act Release No. 63018, 2013 WL 3826277, at *14 (Sept. 30, 2010) (Order Instituting Proceedings). The Commission also uses "scheme" liability to assert primary violations. *See, e.g.*, *SEC v. Goldstone*, 952 F. Supp. 2d 1060, 1133 (D.N.M. 2013); *SEC v. Kelly*, 817 F. Supp. 2d 340, 342 (S.D.N.Y. 2011).

Given the importance of the difference between primary fraud liability and aiding and abetting, this Court should use this case as an opportunity to clarify the line between the two prohibitions. If the lower courts and the SEC are allowed to smudge the line, this Court's decision in *Central Bank* and the aiding and abetting statutes would have no effect. As discussed in this brief, the Court's decisions in *Stoneridge* and *Janus* set down some markers on the boundary between primary and secondary liability under Rule 10b-5, but the court below and other lower courts have not fully accepted the Court's guidance.

Several sources of law help to explain the difference between a primary violation of Rule 10b-5 or Section 17(a) and aiding and abetting. They are the language of the statutes creating the aiding and abetting violation (Part A), the Court's decisions in *Stoneridge* and *Janus* (Part B), and the Court's precedents for giving a narrow scope to the elements of Rule 10b-5 (Part C). In Part D, we explain that the principles distinguishing primary misconduct from aiding and abetting should apply to all subparts of Rule 10b-5 and Section 17(a). Finally, in Part E, the brief argues that the aiding and abetting provisions, the overall structure and context of the statutes, and the Court's precedents rather than the language of Section 17(a) and Rule 10b-5—in isolation—should guide the Court's decision.

A. The substantial assistance element in the aiding and abetting statutes requires more significant conduct by a primary violator.

The language of the main aiding and abetting statutes, Section 15(b) of the Securities Act, 15 U.S.C. § 77o(b), and Section 20(e) of the Exchange Act, 15 U.S.C. § 78t(e), provides guidance on the difference between a primary violation and aiding and abetting. Congress said a key element of aiding and abetting is that the defendant must provide substantial assistance. Under the current version of Section 20(e), the SEC may bring an action against "any person that knowingly or recklessly provides substantial assistance to another person" that violated the Exchange Act or its regulations.[7]

If substantial assistance is required for aiding and abetting, primary liability must require more. If substantial assistance were enough for primary liability, no difference between a primary actor and an aider and abettor would exist. *Central Bank* and Congress's adoption of aiding and abetting provisions would have served no purpose. The statutory substantial assistance requirement tells us that a difference between primary liability and aiding and

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[7] Courts have applied the substantial assistance element. *See, e.g.*, *SEC v. Goble*, 682 F.3d 934, 947 (11th Cir. 2012) (finding that ordering false entries in records to allow a money transfer and signing the money transfer was substantial assistance); *SEC v. Fehn*, 97 F.3d 1276, 1282–84, 1287–88, 1293–96 (9th Cir. 1996) (finding that participation in the editing of information used to market securities was substantial assistance; also discussing adoption of aiding and abetting statute in the Exchange Act).

abetting must exist, and it must be meaningful and substantial.

One of the main flaws in the decision under review and the reasoning of other lower courts and the SEC is that they do not give appropriate weight to the congressional determination that an aider and abettor must provide substantial assistance to another who has violated the securities laws. That language and the very existence of the aiding and abetting statutes sets the boundaries of primary liability, yet the approach of many courts and the SEC is to pull and stretch the language of Section 17(a) and Rule 10b-5 to see if they can make it fit the conduct of the defendant in the case. These authorities view the line drawn in *Janus* as a nuisance to avoid, rather than a sensible reconciliation of the anti-fraud provisions with the statutes creating aiding and abetting liability.

That was the approach of the D.C. Circuit in this case. *Lorenzo v. SEC*, 872 F.3d 578, 589-95 (D.C. Cir. 2017) ("Lorenzo's conduct fits comfortably within the ordinary understanding of . . . the statutory and regulatory language" of Section 17(a) and Rule 10b-5), *cert. granted*, 138 S. Ct. 2650 (June 18, 2018). Nowhere did the court below explain how its interpretation of those provisions also fit with the substantial assistance language in the aiding and abetting statutes, which seems to apply more naturally to the defendant's conduct in this case. Moreover, the court below failed to explain why the limitations established in *Janus* were not appropriate to apply to all subparts of Section 17(a) and Rule 10b-5. Instead, the rationale of *Janus* was restricted to its facts. *Id.* at 590-91.

B. *Stoneridge* and *Janus* provide principles for identifying primary misconduct.

The Court granted certiorari in both *Stoneridge* and *Janus* to distinguish primary misconduct under Rule 10b-5 from aiding and abetting,[8] and both opinions did just that. *Stoneridge* involved allegations that suppliers to a publicly reporting company had violated Rule 10b-5. The company had made false statements to investors based on contracts with the suppliers. The Court limited primary liability by applying a proximate cause analysis to the reliance element of a private action and held that the suppliers were not liable when their dealings with the company were too remote and attenuated from the company's public misstatements. The company was the primary violator, and it made its own, independent decisions about disclosures to its investors, free from the control of the suppliers.[9]

Janus involved the potential liability of an investment adviser for allegedly false statements in the prospectus of a mutual fund. The Court limited primary liability under Rule 10b-5 to the person who makes a false statement. The maker is the person or entity with ultimate authority and control over the content of the statement and whether and how to communicate it. The funds, not the adviser, were the

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[8] *See Stoneridge*, 552 U.S. at 156; *Janus*, 564 U.S. at 141; *see also* Petition for Writ of Certiorari, *Stoneridge*, 552 U.S. 148 (No. 06-43), 2006 WL 1909677, at *i; Petition for Writ of Certiorari, *Janus*, 564 U.S. 135 (No. 09-525), 2009 WL 3614467, at *i.

[9] *Stoneridge*, 552 U.S. at 160–62, 166.

makers of the allegedly false statement. Although the investment adviser participated in the drafting of the funds' prospectuses and had significant influence over the funds, the funds and their boards were separate and independent and had final decision-making power over the contents of the prospectuses.[10]

Both *Stoneridge* and *Janus* stressed that limitations on the scope of Rule 10b-5 were needed to maintain a separation between primary liability and aiding and abetting. *Janus* reasoned that, for *Central Bank* to have any meaning, the Court must "draw a clean line between" those who are primarily liable and those who may not be pursued in private suits.[11] Allowing the SEC and private plaintiffs to do an end-run around the limits established in *Janus* would render that decision pointless.

The *Stoneridge* and *Janus* decisions show that primary liability under Rule 10b-5 must be closely linked to a misstatement or misconduct that deceived a securities offeree, buyer, or seller. A primary violator is a person with ultimate control and authority over that misconduct and is separate from and independent of other persons. Because the analysis distinguished between primary and secondary liability for the core concept of deception, the principles apply to each subpart of Section 17(a) and Rule 10b-5.

Stoneridge and *Janus* also show the gap between deceptive conduct for primary liability and

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[10] *Janus*, 564 U.S. at 142–43, 145–48.

[11] *Id.* at 143 & n.6; *see also Stoneridge*, 552 U.S. at 162–63.

substantial assistance for aiding and abetting. Assistance is not the commission of a deceptive act. The person who commits the violation does more than assist; he, she, or it must have final say over whether, how, and when a deceptive act occurs and must act independently of others. Assistance is help, support, aid, facilitation, or contribution to conduct that is undertaken by another. *Substantial* assistance is more than participation, a "but-for" cause, or a minor or trivial contribution. To be substantial, assistance must play a weighty, large, or material role in the violation.

C. The Court should apply a narrowing rule of construction.

This Court has held that, in construing primary liability under Rule 10b-5, courts should use a rule of construction that narrows the scope of liability. Because the private cause of action for violations of the Rule is judicially created, the Court concluded that it "must give 'narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.'"[12] The Court applied this view in *Janus* to an element of the Rule 10b-5 claim that both the SEC and private plaintiffs must prove, *i.e.*, the identification of the maker of a false statement. The limiting rule of construction therefore is not restricted to elements of a private claim only and should be applied in this case to control the reach of Rule 10b-5 including in SEC actions. In addition, because of the textual parallels between Rule 10b-5

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[12] *Janus*, 564 U.S. at 142 (quoting *Stoneridge*, 552 U.S. at 167); *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 747–48, 749 (1975).

and Section 17(a) discussed below, that limiting rule should apply to both provisions equally.

The Court should not interpret Rule 10b-5 and Section 17(a) "flexibly" to effectuate their remedial purposes. Indeed, the Court has frequently rejected the use of that interpretive policy. Decades ago, the Court said that "generalized references to the remedial purposes" of the securities laws "will not justify reading a provision more broadly than its language and the statutory scheme reasonably permit."[13] The language, structure, and context of the securities laws are what matter. A flexible interpretive approach based on remedial purposes is empty of content, boundless, highly subjective, and inconsistent with the need to give a narrow scope to any Rule 10b-5 claim. The Court should explicitly renounce it.

D. The principles for primary liability under Rule 10b-5 also should apply to Section 17(a).

The text of Rule 10b-5 and the text of Section 17(a) are nearly identical. Some differences exist, but they do not affect the question in this case, which is the scope of primary liability under the two provisions. The principles for establishing primary liability should be the same for Rule 10b-5 and Section 17(a).

Rule 10b-5, which has evolved from a modest beginning to become the principal anti-fraud provision under the federal securities laws, is based on Section 17(a) of the Securities Act. As the drafter

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[13] *Aaron*, 446 U.S. at 695 (internal quotation marks omitted).

of the Rule, Milton Freeman, an Assistant Solicitor at the SEC, recalled: "I looked at Section 10(b) and I looked at Section 17, and I put them together, and the only discussion we had there was where 'in connection with the purchase or sale' should be, and we decided it should be at the end."[14] Given this provenance, it is appropriate to interpret the scope of primary liability under the two provisions the same.

Section 17(a) and Rule 10b-5 differ in a few ways, and those differences might be significant to the facts of an individual case, but the differences are not relevant to the issue raised by this case. One difference is that Section 17(a) applies to "the offer or sale of any securities," while Rule 10b-5 applies "in connection with the purchase or sale of any security."[15] This difference might account for some

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[14] Milton V. Freeman, *Administrative Procedures*, 22 BUS. LAW. 891, 922 (1967) (reporting Milton V. Freeman's remarks at the Conference on Codification of the Federal Securities Laws). Freeman and other members of the staff presented the draft to the Commissioners that morning or after lunch the same day, and the Commissioners unanimously approved the Rule. *Id.* *See also* Milton V. Freeman, *Foreword*, 61 FORDHAM L. REV. S1, S2–S3 (1993). This Court has noted the similarities. *See Ernst & Ernst*, 425 U.S. at 212 n.32.

[15] Other notable differences between Section 17(a) and Rule 10b-5 are the state of mind requirement and the availability of a private right of action, neither of which affects the question of the scope of primary misconduct covered by the two provisions. The Court held in *Aaron*, 446 U.S. at 697, that scienter is an element of a claim under Section 17(a)(1) but not Section 17(a)(2)–(3). Proof of scienter is a necessary element of a claim under Rule 10b-5. *Ernst & Ernst*, 425 U.S at 193 & n.12. The SEC has authority to assert a violation of either Section 17(a) or Rule 10b-5. A private plaintiff may bring a claim for a violation of Rule 10b-5 but, according to most courts of appeals, does not have a right of action under Section 17(a).

other differences in the language of Rule 10b-5(b) and Section 17(a)(2). Under Section 17(a)(2), a person may not "obtain money or property by means of" a misstatement, while Rule 10b-5(b) states that a person may not "make" a misstatement. The introductory language on obtaining money or property makes sense when the unlawful act is in the offer or sale of a security, which is the coverage of Section 17(a), but would not apply to an unlawful act in the purchase of a security. A more general scope was needed for Rule 10b-5, which applies to the purchase or sale of a security.[16]

The symmetry between Section 17(a) and Rule 10b-5 extends to the aiding and abetting provisions in the Securities Act and Exchange Act that supplement these anti-fraud prohibitions. The language of the aiding and abetting provision in the Exchange Act, Section 20(e), is identical to the aiding and abetting provision in Section 15(b) of the Securities Act. Given the use of identical language in these parallel securities laws, it is difficult to escape the conclusion that Congress intended that they should be read the same for purposes of determining primary liability.

The textual parallels between Section 17(a) and Rule 10b-5, on the one hand, and the aiding and abetting statutes in the Exchange Act and Securities

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See, e.g., Maldonado v. Dominguez, 137 F.3d 1, 6–8 (1st Cir 1998). For purposes of determining primary liability, the similarities in the language of the two provisions outweigh the absence of a judicially created private right of action under Section 17(a).

[16] *But see SEC v. Tambone*, 597 F.3d 436, 444–45 (1st Cir. 2010) (en banc).

Act, on the other, support the conclusion that the dividing line between a primary violation of the anti-fraud provisions and aiding and abetting should be the same for both Section 17(a) and Rule 10b-5. The cases that this Court has decided construing that dividing line for purposes of Rule 10b-5—*Central Bank*, *Stoneridge*, and *Janus*—should be equally relevant in construing the line between a primary violation under Section 17(a) and aiding and abetting under Section 15(b).

E. The aiding and abetting provisions, the overall structure and context of the statutes, and the Court's precedents rather than the language of Section 17(a) and Rule 10b-5—in isolation—should guide the Court's decision.

The Court's well-established practice when interpreting legal texts is to give effect to every clause and word of a statute or rule.[17] Various courts have engaged in that analysis of Section 17(a) and Rule 10b-5 as has the SEC.[18] Nevertheless, that exercise is not especially helpful when seeking limits to primary liability for the different subparts of

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[17] *See, e.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009); *Nat'l Ass'n Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007) (cautioning "against reading a text in a way that makes part of it redundant").

[18] *See, e.g.*, *SEC v. Tambone*, 550 F.3d 106, 120–23, 126–28 (1st Cir. 2008), reinstated in part by, 597 F.3d 436, 442–45 (1st Cir. 2010) (en banc); *SEC v. Stoker*, 865 F. Supp. 2d 457, 462–66 (S.D.N.Y. 2012); *In the Matter of John. P. Flannery and James D. Hopkins*, Exchange Act Release No. 3981, 2014 WL 7145625, at *11–18 (Dec. 15, 2014), vacated, *Flannery v. SEC*, 810 F.3d 1 (1st Cir. 2015).

Section 17(a) and Rule 10b-5. In this case, the relationship of the anti-fraud provisions to the aiding and abetting statutes, the overall statutory structure and context, and the Court's precedents are more important than the words of Section 17(a) and Rule 10b-5 plucked from context.

The words of the subparts do not set workable limits on primary liability. Moreover, with one exception, the subparts do not delineate different categories of misconduct. The key words for purposes of the question of primary liability are the verb forms: use, employ, obtain by means of, engage, and make. A person who violates the prohibition uses, employs, engages in, or makes the deception. Other words in the provisions, such as device, scheme, artifice, or act, do not assist in isolating the person who breaches a prohibition,[19] although they might be important in a specific case depending on the particular circumstances.

If the key words were construed without regard to statutory structure, traditional methods of interpreting statutes and rules might permit either narrow or broad constructions. For example, the first subpart of both Section 17(a) and Rule 10b-5 states that a person may not "employ" a device, scheme, or artifice to defraud. "Employ" means to "make use of, as an instrument, means, or material."[20] A person may "make use of" a deceptive act by being the person who made a final decision to

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[19] *But see In the Matter of Francis V. Lorenzo*, Exchange Act Release No. 74836, 2015 WL 1927763, at *11 (Apr. 29, 2015).

[20] WEBSTER'S NEW INT'L DICTIONARY 839, (2d ed. 1934).

have direct contact or communication with an investor or by being a person who arranged for the distribution of deceptive statements written, printed, and planned by another. The concept of employ could be a wide net or a fishhook. The SEC, in a now vacated administrative decision, interpreted Section 17(a)(1) and Rule 10b-5(a) broadly to reach the making of a false statement, the drafting or devising of a misstatement, or the orchestration of sham transactions to give the false appearance of business operations.[21] In this case, a majority of the D.C. Circuit panel held that Lorenzo employed a fraudulent device, but did not make an untrue statement, when he sent an email whose contents and recipients were ordered by his boss.[22] By construing "employ" broadly, while recognizing that it must construe "make" more narrowly, the lower court rendered this Court's construction of "make" in *Janus* irrelevant. Paying lip service to *Janus* is not enough, especially when the allegations in this case are about misstatements.

Similarly, this Court in *Janus* could have viewed the maker of a false statement either narrowly or broadly. The SEC and the Department of Justice contended that "make" should include creating, participating in the drafting, and providing false information that another person puts into a

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[21] *Flannery*, 2014 WL 7145625, at *12, *17.

[22] In a recent decision, the Second Circuit found that stock exchanges were exposed as primary violators on the theory they were co-participants in a market manipulation because they offered products and services to third parties that committed the alleged manipulative conduct. *City of Providence v. BATS Global Markets, Inc.*, 878 F.3d 36, 51 (2d Cir. 2017).

statement.[23] Justice Breyer in dissent argued that ordinary English usage did not impose unduly restrictive boundaries on the idea of making a statement.[24] Nonetheless, the Court rejected those contentions in concluding that the person with ultimate authority and control makes a statement. That interpretation was necessary to give effect to this Court's decision in *Central Bank* and Congress's response to that decision in enacting Section 20(e) of the Exchange Act. Considerations of statutory structure or other factors often demand a narrower construction than the maximum that the plain words will bear.[25]

In addition, the subparts of Section 17(a) and Rule 10b-5 do not indicate that they cover types of deception that are different in kind from each other. The first subpart of both provisions is worded generally to cover all types of securities fraud, including deceptive conduct. The second part of both provisions proscribes a particularized, but the most common, form of fraud—false and misleading statements of material fact. Misstatements are undoubtedly covered by the general prohibition on securities fraud, but they are nonetheless singled out for special mention in the second subpart. The third

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[23] *Janus*, 564 U.S. at 144–145, 148.

[24] *Janus*, 564 U.S. at 151 (Breyer, J., dissenting).

[25] For example, the Court imposed narrowing concepts on language in the bank fraud statute that resembles Section 17(a)(2) of the Securities Act. *Loughrin v. United States*, 134 S. Ct. 2384, 2393 (2014) (holding that the connection between a misrepresentation and the obtaining of bank property must be "more than oblique, indirect, and incidental"; "not every but-for cause will do").

part of both provisions refers to practices or courses of business that operate as a fraud or deceit. The difference between this wording and the first subpart on devices and schemes to defraud does not seem to reach different or broader types of conduct.[26] A practice that operates as a fraud is also a device to defraud.[27] Congress included considerable overlap among the three prongs of Section 17(a), which the SEC carried over to Rule 10b-5.

The overlap of the subparts of Section 17(a) and Rule 10b-5 is relevant because several lower courts have read *Janus* to apply only to allegations that a misstatement violated Rule 10b-5(b). Some courts, including the D.C. Circuit in this case, and the SEC have reached this conclusion with the goal of confining the effect of *Janus* to a narrow area and of expanding primary liability under other parts of Rule 10b-5 and Section 17(a).[28] Under this

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[26] The different wording does bear on the level of culpability needed for Section 17(a)(3). *See Aaron*, 446 U.S. at 696–97.

[27] *See Ernst & Ernst*, 425 U.S. at 199 n.20. In *United States v. Naftalin*, 441 U.S. 768, 774 (1979), the Court observed that each subpart of Section 17(a) proscribes a distinct category of misconduct covering additional kinds of illegalities, but it made the observation as a response to an argument that a phrase solely in Section 17(a)(3) should be read into all three subsections and without carefully examining the text of Section 17(a). *See also Aaron*, 446 U.S. at 697.

[28] *See Lorenzo*, 872 F.3d at 590–92; *SEC v. Monterosso*, 756 F.3d 1326, 1334 (11th Cir. 2014); *Lorenzo*, 2015 WL 1927763, at *10 ("because the language that a primary violator must 'make' a misstatement appears in only Rule 10b-5(b), the Division [of Enforcement] need not establish that a defendant 'made' a misstatement to establish liability under the other antifraud provisions").

interpretation, *Janus* has little application because making a material misstatement falls within the general category of schemes to defraud. Other courts have construed scheme liability in a way that gives *Janus* its full effect.[29]

Because the subparts of Section 17(a) and Rule 10b-5 overlap considerably, and because the differences do not separate primary misconduct from aiding and abetting, the different words of the subparts will not assist in resolving this case. Legal provisions often have redundancies, and courts will not always have a well-founded way to give separate effect to each and every word of connected provisions.[30] A delineation of the distinction between primary misconduct and aiding and abetting

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[29] *See Pub. Pension Fund Grp. v. KV Pharm. Co.*, 679 F.3d 972, 987 (8th Cir. 2012) (finding that a scheme liability claim must be based on conduct beyond misrepresentations or omissions actionable under Rule 10b-5(b)); *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1057 (9th Cir. 2011) (stating that a "defendant may only be liable as part of a fraudulent scheme based upon misrepresentations and omissions under Rules 10b-5(a) or (c) when the scheme also encompasses conduct beyond those misrepresentations or omissions."); *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 642–49 (3d Cir. 2011) (applying *Stoneridge* to deny class certification for scheme liability claims under Rule 10b-5(a) and (c) against an outside lawyer alleged to have participated in preparing a company's misleading public disclosures).

[30] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 176–77 (2012) ("sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance"); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2161–62 (2016) (book review) ("statutes often have redundancies, whether unintended or intended").

requires reference not just to text, but also to statutory structure, context, and precedent.

The precise language of Section 17(a) and Rule 10b-5 does not help separate a primary actor from an aider and abettor. Nor does the text of those provisions offer a reason to confine *Janus* to Rule 10b-5(b). Although the Court could dispose of this case with a rule preventing circumvention or evasion of *Janus* by making the principle underlying that decision applicable to any case involving a misstatement, the better approach would be to apply the principles from *Stoneridge* and *Janus* to all of the subparts of Section 17(a) and Rule 10b-5.

CONCLUSION

The Court should reverse and remand the case with instructions for the lower court and the SEC to apply the Court's limitations on the scope of primary liability for each of the subparts of Section 17(a) and Rule 10b-5.

Respectfully submitted,

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